No. 21207

United States Court of Appeals
For the Ninth Circuit

LARRY P. SMITH, et al., *Appellants,*
vs.
HILLTOP REALTY, INC., et al., *Appellees,*

HILLTOP REALTY, INC., et al., *Cross-Appellants,*
vs.
LARRY P. SMITH, et al., *Cross-Appellees,*
and
THE AUSTIN COMPANY
Additional Cross-Appellee as to Count No. 4 only.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF OF LARRY P. SMITH, ET AL., AS APPELLANTS

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THE ARGUS PRESS SEATTLE, WASHINGTON

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TABLE OF CONTENTS

	Page
I. Introduction	1
II. Burden of Proof	3
III. Review of Hilltop's "Findings" Shows They Are Either Conclusions Drawn From Incompatible Factual Findings Or Are Contrary To The Record	4
Finding No. 1	4
Finding No. 2	4
Finding No. 3	5
Finding No. 4	5
Findings No. 5 and 6	6
Finding No. 7	7
Finding No. 8	8
Finding No. 9	9
Finding No. 10	10
Findings No. 11, 12 and 13	10
Finding No. 14	11
Finding No. 15	13
Findings No. 16, 17, 19 and 20	13
Finding No. 18	15
Finding No. 21	15
Finding No. 22	15
IV. Conclusion	17

TABLE OF AUTHORITIES CITED

CASES

Anderson v. General Motors, 161 F. Supp. 668 (W.D. Wash. 1958), affd. 275 F.2d 63 (9th Cir. 1960)	3

TABLE OF AUTHORITIES CITED

CASES

Page

Anderson v. Knox, 297 F.2d 702 (9th Cir. 1961).... 16

Block v. Block, 165 Ohio St. 365, 135 N.E.2d 857 (1956)..... 7

Bullen v. DeBretteville, 239 F.2d 824 (9th Cir. 1956)..... 2

In re Smith's Estate, 68 Wn. Dec.2d 127, 411 P.2d 879 (1966)..... 3

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918)..... 16

Moon v. Phipps, 67 Wn.2d 948, 411 P.2d 157 (1966)..... 4

Ogle v. United States, 362 F.2d 899 (9th Cir. 1966)..... 5

Reynolds Metals Co. v. Lampert, 316 F.2d 272 (9th Cir. 1963)..... 17

Saberton v. Greenwald, 146 Ohio St. 414, 66 N.E.2d 224 (1946)..... 12, 16

Schubert v. Neyer, 12 Ohio Op.2d 231, 165 N.E.2d 226 (App. 1959)..... 4

Southern Pacific Land Co. v. United States, 367 F.2d 161 (9th Cir. 1966)..... 5

Smyth Sales v. Petroleum Heat & Power Co., 128 F.2d 697 (3rd Cir. 1942)..... 10

Slater v. Motorists Mutual Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962)..... 4

Spiegal v. Beacon Participations, Inc. 297 Mass. 398, 8 N.E.2d 895 (1937)..... 4

Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891)..... 10

Visintine & Co. v. New York, Chicago & St. Louis Ry. Co., 169 Ohio St. 505, 160 N.E.2d 311 (1959)

TABLE OF AUTHORITIES CITED

CASES

Page

Wenzler & Ward Etc. Co. v. Sellen, 53 Wn.2d 96, 330 P.2d 1068 (1958) 8

TEXTBOOKS

25 C.J.S. 737, Damages, Sec. 126 12

4 Corbin, Contracts, Sec. 787 9

5 Moore's Fed. Prac. (2d Ed. 1966) 2630-31, Sec. 52.03 2

5 Moore's Fed. Prac. (2d Ed. 1966) 2637, Sec. 52.04 2

Restatement, Conflict of Laws, Sec. 595 8

1 Restatement, Contracts, Sec. 133 9

1 Restatement, Contracts, Sec. 147 9

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REPLY BRIEF OF LARRY P. SMITH, ET AL., AS APPELLANTS

I. INTRODUCTION

Hilltop dresses the issues raised by our appeal in he raiment of factual questions, invulnerable on ap- eal unless "clearly erroneous" under F. R. C. P. 2(a). But none of the errors we specify involves a nding based on disputed facts. The trial judge recog- ized this when, upon presentation of final judgment, e observed that an appeal by Smith "would involve nly questions of law," whereas an appeal by Hill- op "would involve questions of fact" (R. 2165, see lso R. 2175).

Because the trial judge adopted two written decisions as his only formal findings of fact and conclusions of law (R. 2150), the findings and conclusions are not separately labelled as such. The portions of the decisions to which we have assigned error are either conclusions of law, which, as we pointed out in our opening brief, are contrary to the court's own factual findings (See e.g., Op. Br. 30, 32, 40, 51, 54, 59), or are factual findings which are contrary to the undisputed evidence and, on most crucial points, the admissions of Hilltop (See e.g., Op. Br. 15-21, 31, 38-40, 66-69, 71-79).

Plainly, this court is not bound to respect conclusions which cannot be reconciled with the district court's evidentiary findings. *Bullen v. DeBretteville*, 239 F.2d 824, 835 (9th Cir. 1956), 5 Moore's Fed. Prac. (2nd Ed. 1966) 2630-31, § 52.03, or findings which cannot be reconciled with the uncontradicted testimony, documentary evidence and admitted facts. 5 Moore's Fed. Prac. (2nd Ed. 1966) 2637, § 52.04.

In its brief, Hilltop purports to sustain 22 "Findings" made by the court below. But crucial factual findings which, ironically, Hilltop assigns as error on its own appeal (Hilltop Op. Br. 17-18), conflict with the "findings" Hilltop discusses. Thus, time and again Hilltop affects the stance of winner on vital issues which it lost below and about which it complains on its cross appeal. Chief of these are the court's findings that Smith fully performed its contract with Hilltop (M.D., App. 17)*; that Smith was not actuated by malice or any motive to prefer Severance over Nutwood (See Op. Br. 4, R. 2077, M.D. App. 17-18); that Hilltop failed to prove that the Smith report was wrong (M.D., App. 10; see R. 2143, R. 2089), or that Nutwood had potential as a shopping center site (M.D., App. 10, see O.O., App. 5-6), or that Nutwood was worth more than the $3,500 an acre paid by Ridge Hills, or that Hilltop or the

*References herein to the various parts to the appendix filed with our opening brief are the same as in that brief. See p. 2 of that brief, cited herein as "Op. Br." Hilltop's answering brief is cited, "Ans. Br."

sisters were damaged by the sale to Ridge Hills (M.D., App. 10).

We shall comment on Hilltop's 22 "findings" in the order in which they appear in Hilltop's answering brief. Before doing that we shall reply to Hilltop's attempt to shift the burden of proof to Smith on the ground that Smith** was a fiduciary.

II. BURDEN OF PROOF

There are several complete answers to Hilltop's "burden of proof" argument (Ans. Br. 14). First, even if the relationship be deemed a fiduciary one, the burden of proof would not shift. For example, in *Anderson v. General Motors,* 161 F. Supp. 668 (W.D. Wash. 1958), aff'd. 275 F.2d 63 (9th Cir. 1960), the court, applying Washington law, held that every element of fraud had to be proven by clear, cogent and convincing evidence, despite the fact that plaintiff had based his claim upon an allegation of a "relationship of trust and confidence, which required disclosure." 161 F. Supp at 676. See *In re Smith's Estate,* 68 Wn. Dec.2d 127, 136, 411 P.2d 879, 884 (1966). Second, there is no issue as to which, from a practical standpoint, the burden of proof would make any difference. Even if it were Smith's burden to show that it had no ulterior motive, it carried that burden completely. The court observed as to its finding that Smith had no ulterior motive, "there is no question about that" (O.O., App. 15). The court also found affirmatively that "Smith fully performed its contract . . ." (M.D., App. 17). It was only as to such matters as whether Hilltop was a potential shopping center site and whether it was worth more than $3,500 an acre that there was a failure of proof. As to these matters, Hilltop undeniably had the burden of proof, which it failed to meet. Finally, it is doubtful at best that Smith was a fiduciary in the technical sense of the word. The

**Herein, as in the opening brief, "Smith" refers to Larry Smith & Co. When reference is made to Larry Smith, the individual, he is clearly identified. Larry Smith died January 25, 1967.

court found only that, "by the very nature of the relationship between the parties," Hilltop had a right to rely on the absence of a potential investment by Smith in Severance (M.D., App. 21). As the Washington court recently observed in *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157, 160 (1966), "A simple reposing of trust and confidence in the integrity of another does not alone make of the latter a fiduciary."

III. REVIEW OF HILLTOP'S "FINDINGS" SHOWS THEY ARE EITHER CONCLUSIONS DRAWN FROM INCOMPATIBLE FACTUAL FINDINGS OR ARE CONTRARY TO THE RECORD

Finding No. 1 (Ans. Br. 5, 17)

It is admitted that Hilltop was not informed of Smith's pending negotiations on Severance.

Finding No. 2 (Ans. Br. 5, 17-20)

Here Hilltop indulges in a wide-ranging argument which has little to do with the issue of materiality. We asserted that unless Hilltop would have acted differently, had it known of Smith's potential investment in Severance, the non-disclosure of the facts was not material (Op. Br. 30-31, 45-46). Hilltop's principal counter is that Petti's understanding of the competitive positions of Severance and Nutwood is unimportant (Ans. Br. 19-20). But Petti's belief and understanding is controlling. He was the actor for Hilltop. Since he considered Severance and Nutwood to be non-competitive (Tr., App. 96-99), a belief he conveyed to Treiger (A.F., App. 44), and since he knew Smith was a consultant on Severance (A.F., App. 44, 48), it is unreasonable to think that knowledge of Smith's negotiations would have influenced him in hiring Smith. Fraud cannot be based upon nondisclosure unless the facts concealed are material. *Schubert v. Neyer*, 12 Ohio Op.2d 231, 165 N.E.2d 226 (App., 1959).

Finding No. 3 (Ans. Br. 5, 20)

Again, this finding is not controverted.

Finding No. 4 (Ans. Br. 5, 20-27)

Hilltop misses our point. The element of intent to deceive under Ohio law "imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will. . . ." *Slater v. Motorists Mutual Ins. Co.,* 174 Ohio St. 148, 187 N.E.2d 45 (1962) quoted at Op. Br. 43. The trial judge absolved Smith of having any dishonest purpose or ulterior motive. Compare *Spiegal v. Beacon Participations, Inc.,* 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937), from which the Ohio Supreme Court in *Slater* adopted its definition of "bad faith."

Hilltop would erase the court's expressions on this point by citing *Ogle v. United States,* 362 F.2d 899 (9th Cir. 1966). But all that *Ogle* says is that a trial court's remarks during a trial are erased by inconsistent formal findings. The trial judge's statements cited by us are entirely consistent with the court's formal findings. The statements were made by the district judge not during the trial but as part of a tentative decision after trial (O.O., App. 2, 8) and during an oral argument six months *after* he had entered his principal formal findings (O.O., App. 15). It is perfectly proper to consider such decisions or remarks where they are consistent with the formal findings and serve to illuminate or supplement the formal findings. *Southern Pacific Land Co. v. United States,* 367 F.2d 161 (9th Cir. 1966).

Finally, the court found at least inferentially in its formal findings that Smith's motive of non-disclosure was to respect the confidence of Austin. The court found the concealment "was done pursuant to company policy, as defendants so clearly demonstrate in their posttrial brief (Sec. XIII, pp. 99, et seq.)" (M.D., App. 13). Section XIII of our posttrial brief, which the court found so convincing, was entitled,

"Smith's non-disclosure of its negotiations with Austin was pursuant to its antecedent obligation to Austin." This section of our brief was in direct response to the court's request that the issue of Smith's motivation be thoroughly briefed because, "it is hard for me at this moment to see a motive of pecuniary gain" (O.O., App. 9). As demonstrated by the judge's further remarks after the posttrial briefs were submitted and his written opinion had been filed, the judge always held to the opinion that the non-disclosure was "in connection with Austin Company's good will, there is no question about that, to retain that . . . that has been my feeling all along on that particular phase of it" (O.O., App. 15).

Small wonder that Hilltop wants to "erase" the court's firm conviction, expressed in differing terms at least six times (M.D., App. 13, 17-18, R. 2077, O.O., App. 2, 8-9, 15). Hilltop's extended argument (Ans. Br. 20-27) is a shortened version of the argument it presented in its posttrial brief to try to convince the trial judge that Smith had an ulterior motive or dishonest purpose. (See remark of Hilltop's counsel quoted at O.O., App. 15). The trial judge rejected all of these arguments. Far from being subject to erasure or being "clearly erroneous," his findings, repeatedly expressed, were clearly correct.

Findings No. 5 and 6 (Ans. Br. 6, 27-36)

Hilltop confuses two distinct findings of reliance one Hilltop's reliance on the conclusions of the report (M.D., App. 10) and the other Hilltop's reliance on its understanding of Smith's relationship to Severance (M.D., App. 12). We have assigned as clear error the court's finding that Hilltop relied on the conclusions of the report (Op. Br. 15-24, 31) and have dealt with the other finding under the issues of both materiality and reliance (Op. Br. 30-32). The "reliance" which the district judge found to be an element of fraud was reliance on a belief as to Smith's relation to Severance (M.D., App. 11-12).

The court could not and did not find that Hilltop

was damaged by its reliance on the conclusions of the report, since the court was not "persuaded that the conclusions reached in the Nutwood analysis were wrong" (M.D., App. 10). Reliance on Smith's relationship to Severance could not possibly damage Hilltop, unless the product which Smith turned out caused damage. Obviously, one seeking damages based upon an allegation of fraud must prove both reliance and damage. *Block v. Block,* 165 Ohio St. 365, 135 N.E.2d 857 (1956).

Under the heading "reliance," Hilltop argues many irrelevancies. We restrain our temptation to answer point for point, and limit ourselves instead to three glaring examples. Just what, for example, Larry Smith's membership in a professional society has to do with reliance we fail to see (Ans. Br. 31). Neither could the trial judge (Tr. 542). Just what, for a second example, the doctrine of *res gestae* has to do with reliance, we likewise cannot understand (Ans. Br. 32-36). And just how, for one more example, the reference to Vincent Aveni's testimony on page 35 affects reliance by anyone we are unable even to guess. Aveni merely relied on Petti, who was president of Hilltop (Tr. 535-36).

Finding No. 7 (Ans. Br. 6, 36-38)

We do not question the court's finding that Hilltop had a right to rely on the Nutwood analysis. Our point is that Hilltop admits that it did not so rely (Op. Br. 15-21, 31, 46-49). As to Hilltop's right to rely on Smith's statements of its connection with Severance, our position is that reliance or non-reliance has no practical significance, in the absence of further findings that Hilltop relied on the Nutwood analysis *and* the analysis was incorrect (Op. Br. 46-49).

We have no quarrel with the general legal propositions cited by Hilltop (Ans. Br. 36-38). However, Hilltop's lone factual statement that, "At best all Smith ever told Hilltop or O'Neill were gross half-

truths relating to its 'pre-existing consulting relationship' with Severance" (Ans. Br. 37) is itself at best a gross half-truth. Tom Crume, secretary of Hilltop, admitted that Treiger told Hilltop and O'Neill on October 8, 1959, at their first meeting, that Smith was still acting as consultant on Severance (Tr. 480-81, see A.F., App. 44, 48).

Finding No. 8 (Ans. Br. 38-40)

It is patent that Hilltop sustained no damage, either from its alleged reliance on the report or from its alleged reliance on the nondisclosure. It failed to show that Nutwood was valuable as a regional shopping center site or that it was worth more than the price for which it was sold (M.D., App. 10). Hilltop's efforts for years on behalf of Ridge Hills to promote Nutwood for shopping center purposes is eloquent evidence of the unsuitability of the site for that purpose (See Table, App. 173-76). Hilltop showed no damage in hiring Smith or in paying for the report, and in fact never pleaded any such damage. The court found damage, but only by concluding that a report, the conclusions of which were not proved wrong (M.D., App. 10), and which contained only "inconsequential" errors (M.D., App. 17), was "worthless" because of a nondisclosure which neither affected the validity of the conclusions nor the use of the report (M.D., App. 17). This is clearly a conclusion of law, for which there is no foundation.

Hilltop argues (Ans. Br. 38-40) that the court may use discretion as to damages. Washington law controls this question, since it is a matter of proof. Restatement, Conflict of Laws, Sec. 595. No doubt a trier of fact may use discretion in measuring damages, once found to exist, but the *existence* of damage is something which must be clearly established. *Wenzler & Ward Etc. Co. v. Sellen*, 53 Wn.2d 96, 330 P.2d 1068 (1958). In this case, the court erroneously assumed the fact of damage.

Hilltop further urges that the sisters were third

party beneficiaries of the Hilltop-Smith agreement (Ans. Br. 38-40). Since in its final judgment the trial court dismissed the contract action as to all parties including Hilltop (R. 2148), the status of the sisters would make no difference. The trial court specifically held that, "Smith fully performed its contract . . ." (M.D., App. 17).

Nevertheless, the court had earlier indicated that in his opinion the sisters were merely incidental beneficiaries and had said, "my mind is pretty well resolved on that phase of it, right or wrong" (O.O., App. 7). That the court was right on this issue is demonstrated not only by the facts but by the applicable law. There is nothing in the facts to indicate any relationship between Hilltop and the sisters which would suggest a gift intent. Further, the facts do not support the assertion that the sisters were creditor beneficiaries. The undertaking by Hilltop to procure a market analysis was for Hilltop's own benefit, to win an extension of its exclusive brokerage agreement (A.F., App. 41-42). See 1 Restatement, Contracts, § 133 and 4 Corbin, Contracts, § 787. Illustration 1, 1 Restatement, Contracts, § 147 shows clearly that the sisters would be categorized as incidental beneficiaries. Ohio appears to follow the Restatement of Contracts' approach. *Visintine & Co. v. New York, Chicago & St. Louis Ry. Co.*, 169 Ohio St. 505, 160 N.E.2d 311 (1959).

Finding No. 9 (Ans. Br. 7, 40-45)

We do not claim that the court's expression after trial of a "very definite opinion that the concealment in law amounted to constructive fraud" (O.O., App. 7) governs the court's later formal finding of "wanton and reckless disregard" (M.D., App. 12). We do contend that punitive damages are not supportable under Ohio law by a finding of "wanton and reckless disregard" (Op. Br. 62-65). We also believe it appropriate for us to point out, as bearing on whether punitive damages are justified, that the rejection of the trier of facts on August 6, 1965, im-

mediately at the conclusion of the twelve-day trial, was a "very definite opinion that the concealment in law amounted to constructive fraud." Imposition of punitive damages in Ohio is not supported by a finding of constructive fraud (Op. Br. 42); rather, findings of actual fraud and actual malice are necessary (Op. Br. 62-65).

Finding No. 10 (Ans. Br. 7, 45-46)

We do not question the trial court's finding that the nondisclosure of the Severance negotiations was authorized by Treiger's fellow employees, Orndahl and Imus. Our contention is simply that the award of punitive damages was improper, since none of the partners authorized or ratified Treiger's action (Op. Br. 71-79). As Hilltop itself points out (Ans. Br. 46) the trial court's finding that the non-disclosure was pursuant to "company policy" simply means that it was in conformity with the company policy to preserve the confidences of Austin. Surely no authorization of Treiger's action can be read into a general company rule that the confidences of clients be respected. What is more, the court found no such authorization (O.O., App. 6).

Findings No. 11, 12, and 13 (Ans. Br. 45-56)

Hilltop argues that the court properly inferred that one or more of the Smith partners either authorized or ratified Treiger's conduct. All of the direct evidence is to the effect that the partners never even heard of Hilltop or Nutwood until this suit was threatened (Op. Br. 71-79).

Hilltop cites a company meeting in Washington on September 28, 1959, attended by Larry Smith, to support an inference that Larry Smith must have known of and approved Treiger's action (Ans. Br. 49). The minutes of this meeting, which were produced in discovery (Ex. 254), do not show that Nutwood was a topic of discussion. The participants in the meeting all testified that Nutwood was not dis-

cussed, to the best of their recollection (Kelly Tr. 2191-92, Treiger Tr. 2303, Imus Tr. 1890-91; see Larry Smith Tr. 2446). We have discussed previously the other "evidence" of authorization and ratification (Op. Br. 71-79), none of which supports any sort of inference.

The "succeeding events" referred to fleetingly on pages 49-50 of Hilltop's brief are typical of the stuff from which Hilltop would fashion an inference. But these "events" are all geared to creating an impression that Smith rendered a negative report for some ulterior reason, an inference which the trial judge expressly rejected. Hilltop's style of ignoring the record in compiling "events" may be illustrated by its charge that the Nutwood report was hastily drafted over the Christmas holidays rather than the 90 days forecast (Ans. Br. 49). Actually, no report such as was contemplated by the original agreement was ever rendered. When Smith's preliminary research was completed, and it became evident that the Nutwood site was hopeless for near term development as a shopping center (see Marshall Tr. 931), the parties agreed that Smith would furnish a "memorandum" instead of a formal report and would reduce its fee accordingly (A.F., App. 59). Hilltop paid $2,920 for the memorandum, instead of the $4,500 originally agreed for a full report. Work on the Nutwood analysis commenced on about December 7, 1959 (A.F., App. 53), and not "over the Christmas holiday period." John Marshall, who was in charge of the analysis, testified that he had adequate time to make the analysis (Tr. 915).

Finding No. 14 (Ans. Br. 7, 45-56)

Hilltop strains to make of Ray Treiger some sort of arch villain whose sole occupation, guided by Larry Smith himself, was to sink Nutwood as an incipient threat to Severance. Not only is there a total lack of showing that Treiger ever discussed Nutwood with Larry Smith or any other then partner, but Treiger's timesheets during the period September, 1959 through

January, 1960 show how far fetched any inference would be that he did so. During the five-month period, Treiger accounted for about 1,170 hours. Except for October 8, 1959, the day of his visit with Petti and O'Neill in Cleveland, Treiger's sheets show a total of 16 hours spent on Nutwood and 11 hours on Severance (Ex. 155). Thus, Hilltop and Severance together accounted for about three percent of Treiger's total time for the five-month period; as to Nutwood, he delegated the judgment-making in this routine assignment (Marshall Tr. 914-15, Darmstadter Tr., App. 94-95) to Marshall and Darmstadter, neither of whom had any inkling that the Smith firm was negotiating on Severance. The district judge expressed his view of Hilltop's assertion that Treiger must have told Larry Smith about Hilltop, in the following terms:

> "Well, I am afraid I would have to do an awful lot of stretching to attach that implication to it" (Tr. 2448).

Hilltop asks this court to draw an inference of ratification of Treiger's conduct from the retention of him as an employee (Ans. Br. 54-56). The trial judge did not draw such an inference. Smith would have no occasion to fire a valued employee for what it believes, at worst, was a mistake of judgment (Op. Br. 44-45). In any event, mere retention of an employee affords no basis for holding an employer liable for vindictive damages. Ratification requires some affirmative act. 25 *C.J.S.* 737, Damages, Sec. 126.

Hilltop bases its argument upon *Saberton v. Greenwald,* 146 Ohio St. 414, 66 N.E. 2d 224 (1946). But, in that case, decided 4-3, the principal was present when his salesman represented an old watch to be a new one. The *Saberton* ruling was obviously based upon a quoted passage from 15 *Am. Jur.* 731 which indicated that the failure of a defendant to intervene when present at a transaction amounts to ratification. No such situation exists in the present case.

Finding No. 15 (Ans. Br. 7, 45)

Hilltop has not even bothered to argue the correctness of this conclusionary finding. There is no support for it in fact or in law (See Op. Br. 40-51, 58-61).

Findings No. 16, 17, 19 and 20 (Ans. Br. 8-9, 56-61)

Most of Hilltop's argument is refuted by our opening brief (pp. 66-69). Seeming to realize that the factors which the court relied on as justifying punitive damages do not support the award, Hilltop lists six more items of information which Smith allegedly withheld, and which Hilltop claims it had to commence litigation to discover. Those contentions and our answers are as follows:

(1) "Smith was buying a competitive property while purporting to give an objective report on a competing property, Nutwood;"

Hilltop learned of Smith's purchase of Severance in July, 1960 (A.F., App. 79-80), and was told the details on February 15, 1961, two years before suit (O'Neill Tr. 2666-67). Obviously, it did not have to litigate to discover these facts.

(2) "Smith knew . . . that the site on which he was asked to make such a report was in the very trade area of Severance;"

Hilltop was told by Smith on or about January 8, 1960, when Smith mailed the Nutwood memorandum to Hilltop (A.F., App. 59) that Severance was within the Nutwood trade area (Ex. 29, App. 160). Before that, when he first met Petti and O'Neill, on October 9, 1959, Treiger emphasized the possible conflict of interest between Smith's working on Severance and Nutwood (A.F., App. 48).

(3) "That the report was not scientific, but one in which judgment could vary widely;"

There was never any contrary assertion. Petti and O'Neill were well aware that they were asking for an opinion (A.F., App. 45, 47-49). They even discussed

quite cynically the posssibility of hiring a different consultant because they understood that firm to have submitted a previous report which "makes an argument favorable to our location [Nutwood]" (A.F., App. 40). The Nutwood analysis itself (Ex. 29) is couched in terms of "opinion". (See, e.g., App. 152, 162).

(4) "That other nationally recognized consultants were available;"

Petti, of course, knew this from the start, having written to two other consultants concurrently with writing to Smith (Ans. Br. 31, A.F., App. 43, 49). As late as October 23, 1959, there was still a possibility that Hilltop might hire someone other than Smith (Petti Tr. 356).

(5) "That such an objective and favorable report would be a valuable and virtually essential prerequisite to attracting department store tenants."

Smith never asserted that its report had such miraculous powers. The evidence showed that department stores rely on their own analyses, rather than those of an outside firm retained by the owner of the property under consideration (Walton Tr. 2071-72, Petti Tr. 421-25). One developer, according to Petti, would not "have paid any more attention to the [Smith] report than the man in the moon" (Tr. 380). Another told Petti unequivocally that he preferred to make his own studies (Tr. 360).

(6) "That its concealment continued . . . between . . . January 4, 1960 and the sale of Nutwood on April 29, 1960 . . . ."

Again, Smith's position at Severance was known to Hilltop years before litigation was commenced (See Op. Br. 66-69).

How these six items in any way justified litigation is impossible for us to discern.

On pages 59-60 of its brief, Hilltop in what appears to be an irrelevant diversion from Findings 16-20,

states that several stores showed interest in the Cleveland suburbs. What Hilltop neglects to add, however, is that these stores were pursued unsuccessfully by Austin to go into Severance.

We feel it an impermissible jump to argue from the fact that Austin unsuccessfully pursued department stores A, B & C for Severance, that a positive report by Smith might have landed them at Nutwood.

Finding No. 18 (Ans. Br. 9, 56)

Again, Hilltop has not presented any argument to support this conclusionary finding.

Finding No. 21 (Ans. Br. 9, 62)

Hilltop's argument requires no answer beyond our opening brief (p. 65-71). At the court's request, we filed comprehensive exceptions to the expenses and attorneys' time incurred by Hilltop (R. 1914-2012). We concluded that, even if Hilltop were somehow entitled to recover its litigation expenses, $15,500 was the most that should be awarded (R. 1949), and that the maximum hours which Hilltop could reasonably charge for its attorneys was 925 (R. 1948). Actually, Hilltop incurred no attorneys' fees, since its attorneys were employed on a contingent fee basis. To overcome the problem posed by this fact the trial judge ordered Hilltop and its counsel to rescind their agreement, which they did (Ans. Br. 63, R. 1488-89).

Finding No. 22 (Ans. Br. 66-71)

This "finding" relates to the trial judge's conclusion that the case was a proper one for application of the Ohio law of puntive damages (See Op. Br. 54-59).

Hilltop's argument in support of the application of Ohio law is based in large part upon cases dealing with the question whether or not to allow action to be brought on a foreign wrongful death statute. Such cases have little bearing here, since Washington law,

if applied, would allow this action and allow fully compensatory damages. It would merely preclude the use of the civil court for punishment, which is the function of punitive damages as understood by the courts of both states. *Spokane Truck & Dray Co. v. Hoefer,* 2 Wash. 45, 25 Pac. 1072 (1891); *Saberton v. Greenwald,* 146 Ohio St. 414, 66 N.E. 2d 224 (1946).

Even the cases cited by appellees support our position. Judge Cardozo in *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 120 N.E. 198 (1918) (Ans. Br. 68) said that courts, "do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Washington's tradition against using civil process for punishment certainly is deep-rooted, having been adhered to since the question was first presented in *Spokane Truck & Dray Co. v. Hoefer, supra.* Punitive damages, according to that decision, are based upon a theory "which is repugnant to every sense of justice;" further, "the doctrine of punitive damages is unsound in principle and unfair and dangerous in practice . . . ." 2 Wash. at 54, 56, 25 Pac. at 1074-75.

Smyth Sales v. Petroleum Heat & Power Co. 128 F.2d 697 (3rd Cir. 1942) (Ans. Br. 70), does not stand for the proposition that Washington would allow Ohio punitive damage law to apply. The forum state in *Smyth,* New Jersey, apparently allows punitive damages as a matter of local law, so would not regard foreign punitive damage laws as penal. Judge Goodrich, in the *Smyth* opinion, stated the rule which we think controls here, as follows:

> ". . . The measure of damages, compensatory or exemplary, in tort actions, is determined by the law of the place of wrong, except that in some instances the forum may not allow exemplary damages even though allowed by the law of the state where the wrong occurred because the forum considers them penal." 128 F.2d at 702.

The citation by Hilltop of *Anderson v. Knox,* 297

F.2d 702 (9th Cir. 1961) and *Reynolds Metals Co. v. Lampert,* 316 F.2d 272 (9th Cir. 1963) (Ans. Br. 44-45) are not apposite since this case will not be determined under the laws of Hawaii or Oregon. The first quote at p. 44 of Hilltop's brief is not from the opinion of this court, but of a court of Hawaii.

IV. CONCLUSION

In its answering brief Hilltop does little to join the issues on this appeal. Instead it has sought to bury the true issues in an avalanche of irrelevancies and misleading statements. For example, in its "Conclusion" Hilltop quotes from Exhibit 313 (Ans. Br. 71), an undated document offered post-trial (R. 2192) but never identified in the trial or post-trial record by any witness. If, as Hilltop suggests, it is a report on severance sent by Smith to a financial house on March 20, 1959 (Ans. Br. 24), it was sent six months before anyone connected with the Smith Company ever even heard of Nutwood. Again, in its "Conclusion" Hilltop implies, by citing F.R.C.P. 52(a) (Ans. Br. 72), that the trial court found Smith to have made a "false report" (Ans. Br. 71) with an ulterior motive, to damage Nutwood. But the court found Hilltop's three year attack on the report to have unearthed only "inconsequential errors" (M.D., App. 7), found Hilltop's charges as to Smith's motive to be completely without merit (R. 2134-35), and found Hilltop's contentions of damage to amount to "no more than speculation and conjecture" (M.D., App. 10).

For the reasons set forth in our opening brief, we ask that the judgment, insofar as it awards compensatory or puntive damages or attorneys' fees to Hilltop or to the sisters, be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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